

LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED

AUG 24 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 34.

**INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 1291,**

Petitioner,

v.

PHILADELPHIA MARINE TRADE ASSOCIATION.

**On Writ of Certiorari to the United States Court of Appeals
For the Third Circuit.**

BRIEF FOR PETITIONER.

**ABRAHAM E. FREEDMAN,
MARTIN J. VIGDERMAN,
FREEDMAN, BOROWSKY AND LOBBY,
Lafayette Building, Eighth Floor,
Philadelphia, Pennsylvania. 19106 .**
Counsel for Petitioner.

INDEX.

| | Page |
|---|------|
| OPINIONS OF THE COURTS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| STATUTES AND RULES INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| ARGUMENT | 10 |
| I. The Court Below Was Deprived of Jurisdiction to Entertain the Complaint by Section 4 of the Norris- LaGuardia Act Because It Sought to Restrain a Work Stoppage Arising Out of a Labor Dispute, and the Complaint Should, Therefore, Have Been Summarily Dismissed | 10 |
| II. The Complaint Should Have Been Dismissed for Mootness | 16 |
| III. The Refusal of the District Court to Clarify or Explain the Nature of the Conduct Covered by Its Manda- tory Order and to Give Reasons for Its Issuance and Make Findings of Fact and Conclusions of Law Is Most Prejudicial and in Flagrant Violation of F. R. C. P. 52(a) and 65(d) | 17 |
| CONCLUSION | 20 |
| APPENDIX A | 21 |

TABLE OF CASES CITED.

| | Page |
|--|-----------------------------------|
| Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Wisconsin Employment Relations Board, 340 U. S. 416, 95 L. Ed. 389 (1951) | 16 |
| Brotherhood of Railroad Trainmen v. Chicago & I. M. R. Co., 375 U. S. 18, 11 L. Ed. 2d 39 (1963) | 17 |
| Gibbs v. Buck, 307 U. S. 66, 83 L. Ed. 1111 | 20 |
| Gulf & South American S. S. Co. v. National Maritime Union of America, 360 F. 2d 63 (1966) | 15 |
| Hook v. Hook & Ackerman, Inc., 213 F. 2d 122 | 19 |
| Marine Transport Lines, Inc. v. Curran, 55 L. C. 11748 | 14 |
| Mayflower Industries v. Thor Corporation, 182 F. 2d 800 | 20 |
| Sinclair Refining Co. v. Atkinson, 370 U. S. 195, 8 L. Ed. 2d 440, 82 S. Ct. 1328 | 6, 10, 12, 13, 14, 15, 16, 19, 20 |
| Textile Workers Union v. Lincoln Mills, 353 U. S. 448, 1 L. Ed. • 2d 972 | 12, 13 |
| Todd v. Joint Apprenticeship Committee, 332 F. 2d 243 (1964) | 17 |
| United Steelworkers of America v. American Mfg. Co., 363 U. S. 565, 4 L. Ed. 2d 1403 | 11, 12 |
| United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U. S. 593, 4 L. Ed. 2d 1424 | 11, 12 |
| United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U. S. 574, 4 L. Ed. 2d 1409 | 11, 12 |

STATUTES AND RULES CITED.

| | Page |
|--|-------------------|
| F. R. C. P. 52(a) | 2, 17, 18, 19, 20 |
| F. R. C. P. 65(d) | 2, 17, 18, 19, 20 |
| National Labor Relations Act, Section 301 (29 U. S. C. A. 185(a)) | 11 |
| Norris-LaGuardia Act, Section 4 | 11 |
| 28 U. S. C. § 1254(1) | 2 |

IN THE
Supreme Court of the United States

October Term, 1967

No. 34

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCAL 1291,

Petitioner,

v.

PHILADELPHIA MARINE TRADE ASSOCIATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER.

OPINIONS OF THE COURTS BELOW.

The District Court for the Eastern District of Pennsylvania did not render any opinion but filed an order which is unreported, but which is printed in the Record at p. 113. The opinion of the Court of Appeals for the Third Circuit is reported at 365 F. 2d.295 (R. 114). The order of the Court of Appeals for the Third Circuit denying rehearing is printed in the Record at p. 128.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on August 11, 1966 (R. 127). The order denying rehearing was entered on September 22, 1966 (R. 128). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Does a federal court have jurisdiction to enjoin a union from a work stoppage arising out of a labor dispute, under the guise of an order for specific performance to enforce an arbitrator's award?

2. Is it not error for a trial judge to retain jurisdiction of a case which is admittedly moot and thereafter to hold a hearing on another dispute involving different parties on an ex parte report of one of the parties, without requiring a new complaint or any pleading setting forth the new dispute, and then enter an ambiguous order subsequently construed to be a restraining order, which he refused to clarify or explain, in violation of F. R. C. P. 65(d), and concerning which he failed to make findings of fact and conclusions of law, in violation of F. R. C. P. 52(a)?

STATUTES AND RULES INVOLVED.

The statutory provisions and rules involved are: Norris-LaGuardia Act, Act of March 23, 1932, c. 90, Sec. 4, 47 Stat. 70, 29 U. S. C. A. 104; Federal Rules of Civil Procedure 52(a) and 65(d). They are set forth in Appendix hereto.

STATEMENT OF THE CASE.¹

Philadelphia Marine Trade Association (PMTA) represents the employer group under the terms of a collective bargaining agreement with Local 1291, International Longshoremen's Association (ILA) in the Port of Philadelphia.

The agreement provides for the employment of longshoremen on the day before the commencement of the work. Article 10(6) provides that the employer may, at 7:30 a.m., "setback" the starting time from 8:00 a.m. to 1:00 p.m., in which event the longshoremen receive a one-hour guarantee for the morning (R. 7). Article 9(h) provides that if the employment is terminated because of inclement weather, the men shall receive a four-hour guarantee (R. 12). Section 28 of the agreement provides for grievance and arbitration procedure and requires that all disputes and grievances "of any kind or nature whatsoever arising under the terms and conditions of this agreement" shall be submitted to a grievance committee; and, if the dispute is not settled at that level, then it must be submitted to arbitration (R. 12-13).

On April 25, 1965, T. Hogan Corporation, one of the employer members of PMTA, hired a number of longshoreman gangs for an 8:00 a.m. start the next day. The following morning Hogan changed the starting time to 2:00 p.m. because of inclement weather and offered only one hour of the guarantee time for the loss of the morning's employment under Article 10(6) of the union agreement. The union objected, claiming that the men were entitled to four hours' pay under the inclement weather clause, 9(h). The matter was submitted to arbitration and, after a number of hearings, with extensive testimony rendered by both sides, the arbitrator declined to hear summation from counsel

1. Since this case and No. 78 of this Term are companion proceedings, the latter being a contempt action which flowed from this injunction proceeding, this statement will include the complete resume of facts in order to avoid overlapping and for the convenience of the Court.

for both sides and stated further that he did not desire any briefs from the parties. Several weeks later, he rendered a decision holding that Section 10(6) of the agreement, standing by itself, required a one-hour guarantee, and he, accordingly, rejected the union's claim for four hours. He refused to consider the inclement weather clause or any other section of the agreement than 10(6) on which he based his conclusion (R. 16-31).²

The award of the arbitrator provided that the employer could invoke the set back clause 10(6). "without qualification" under a one-hour guarantee (R. 31).³

On July 29, 1965, another dispute erupted when Nacirema Operating Co., another employer, not involved in the prior dispute, changed the starting time from 8:00 a.m. to 1:00 p.m. because of inclement weather and offered the longshoremen one-hour guarantee time, instead of the four-hour guarantee under the inclement weather clause. The union demanded arbitration of the dispute under the agreement, but the employer frustrated the arbitration procedure by bringing an action in the federal court to extend the arbitrator's decision in connection with the dispute of April 26, 1965 to all future disputes, and sought to restrain any further union attempts to arbitrate that issue or the inclement weather clause issue and to enjoin all work stoppages in connection therewith.⁴ The suit was treated as one for an injunction, and the district judge scheduled an imme-

2. It is extraordinary that the arbitrator should decline to hear the arguments of counsel at the end of the evidence or to request briefs so that both sides would have an opportunity to fully express their views regarding the inferences and conclusions to be drawn from the evidence and the interpretation to be given to the agreement as a whole, not merely any single section thereof.

3. There is no provision in the award requiring the longshoremen to return to work because there was, in fact, no work stoppage.

4. The agreement required that "all disputes" must be submitted to grievance and arbitration. Moreover, Section 28, the arbitration clause, provides that "should the terms and conditions of this agreement fail to specifically provide for an issue in dispute or should a provision of this agreement be the subject of disputed interpretation, the arbitrator shall consider *port practice* in resolving the issue before

diat hearing, by which time the longshoremen had all returned to work, and the action had become moot. Judge Body denied the union's motion to dismiss on the ground of mootness and for lack of jurisdiction, and he "retained jurisdiction" of the case so that "if anything arises", he would "handle it at that time" (R. 45, 46, 61, 73, 82).⁵

A new dispute arose involving an entirely different group of employers on September 13, 1965, when a large group of gangs who had been employed the day before were advised that they would be set back from an 8:00 a.m. start to a 1:00 p.m. start that day because of inclement weather, and they were offered the one-hour guarantee, instead of the four-hour guarantee under the inclement weather clause (R. 70, Case No. 78). The union claimed the four-hour guarantee under the inclement weather clause, and the employers refused. The union demanded arbitration, which the employers denied (R. 80-81). Instead, counsel for the employers "reported" ex parte to the District Judge, who then scheduled an immediate hearing on the basis of the "facts" reported (R. 75). At the hearing on September 13 and 15, 1965, the union objected and moved that the "facts" be pleaded, as required by the Federal Rules of Civil Procedure (R. 79-81, 88). This motion was summarily denied (R. 90). The union repeated the motion to dismiss for lack of jurisdiction based on this

him" (R. 14). Furthermore, the record shows that on prior occasions, a disputed clause in the agreement was arbitrated on each occasion that a dispute arose, even though the issue was identical; and, with respect to one of the provisions in the same agreement, the identical issue was re-arbitrated as many as five times, and, on the last occasion, the arbitrator reversed his prior rulings (No. 78, October Term, 1967, R. 118-119).

5. In support of the motion to dismiss, counsel for the union cited this Court's decision in *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195, but the court summarily denied the motion without examining the decision (R. 82). The court also ignored this Court's decision in *Amalgamated Assn., etc. v. Wisc. ERB*, 340 U. S. 416, 95 L. ed. 389, which held that mootness deprived a federal court of jurisdiction and required a dismissal of the complaint.

Court's decision in *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195 (R. 82-83), but this motion also was summarily denied (R. 83). The hearing proceeded on the "facts" reported to the judge. Counsel for the union refused to cross-examine any witnesses or to offer any evidence on the ground that he could not properly present any defense because of the absence of the necessary pleadings and other requirements of the Rules (R. 95, 97, 101).

At the conclusion of the hearing, the court entered an order stating that the arbitrator's award "be specifically enforced", and that the union "comply" with said award (R. 113).⁶ Since the arbitrator's award simply construed Section 10(6) of the agreement and refused the union's claim for four hours of guarantee time, it was completely unclear what was intended by the court's order. Union counsel, therefore, requested clarification and, particularly, to determine whether the court's order restrained a strike or a work stoppage or precluded the union from attempting to invoke the arbitration process in future disputes (R. 111-12). Judge Body flatly refused to explain or amplify his order and to make findings as required by the Federal Rules of Civil Procedure (R. 112-13).⁷

6. The arbitration award (R. 30) simply denied the claim of the union for four hours and sustained the employer's position that only one hour was due under the set back clause. The award did not contain any order or instruction that the longshoremen return to work. Indeed, there was no work stoppage in connection with the dispute of April 26, 1965.

7. The record shows a determined effort by counsel for clarification, and an even greater determination by the district judge to keep defendant in the dark (R. 111-12):

"THE COURT: I will sign this order.

"MR. FREEDMAN: Well, what does it mean, Your Honor?

"THE COURT: That you will have to determine, what it means.

"MR. FREEDMAN: Well, I am asking. I have to give my client advice and I don't know what it means. I am asking Your Honor to tell me what it means. It doesn't—

"THE COURT: You handled the case. You know about it. You are arguing it doesn't fit into this case.

Five months after the entry of the foregoing order, on February 24, 1966, a different group of companies employed a large number of longshoreman gangs to start work at 8:00 a.m. the following morning. The next day the employers, at 7:50 a.m., set back the starting time to 1:00 p.m. because of inclement weather and offered to pay only the one-hour guarantee instead of the four-hour guarantee under the inclement weather clause.⁸ The longshoremen protested to the union officials, who advised them to report as directed, and they would invoke the grievance and arbitration machinery in an effort to obtain the four-

"MR. FREEDMAN: I am telling you very frankly now I don't know what this order means, this proposed order. It says, 'Enforcement of the award.' Now, just what does it mean? Are we being restrained from a work stoppage? . . .

"THE COURT: The Court has acted. This is the order.

"MR. FREEDMAN: Well, won't Your Honor tell me what it means?

"THE COURT: You read the English language and I do.

"MR. FREEDMAN: I will ask you, but it doesn't say it. I can't understand it. I am telling Your Honor I don't understand it. Now, perhaps Your Honor can explain it to me. Does this mean that the union cannot engage in a strike or refuse to work or picket?

"THE COURT: You know what the arbitration was about. You know the result of the arbitration.

"MR. FREEDMAN: The arbitration here was under a specific set of facts, involved an interpretation of the contract under a specific set of facts, and he made that interpretation. Now, how do you enforce it? That case is over and done with. These are new cases. Your Honor is changing the contract of the parties when you foreclose them from going to arbitration on this point again.

"THE COURT: I have signed the order. Anything else to come before us?

"MR. FREEDMAN: I know, but Your Honor is leaving me in the sky. I don't know what to say to my client."

8. The set back clause 10(6) under which the employers allegedly set back the starting time required that the longshoremen be notified at 7:30 a.m.

hour guarantee (No. 78; R. 70, 86-87, 127).⁹ However, provoked by the frequency of the set backs over the past ten months, the longshoremen who had been denied employment that morning marched up and down the waterfront and succeeded in causing other longshoremen to knock off work on other vessels, despite the pleas of the union officials to continue working while they made an effort to adjust the matter with the employers. The union distributed circulars along the waterfront and made personal pleas thereafter urging the men to return to work.¹⁰ The employers admitted that the union and the officials did all in their power to effect the return of the men to their jobs (No. 78; R. 5, 148). Even the president of the employer association admitted the sincerity of the union officials' efforts (No. 78; R. 53).

The union officials orally asked the employer association to discuss the matter under Section 28, the grievance and arbitration provision in the agreement, but the employers refused. The union then sent a telegram to the employers invoking the grievance and arbitration clause under the contract (No. 78; R. 29-30, 92-93). Thereupon the employers "reported" ex parte to Judge Body the "facts" relating to this latest work stoppage and claimed that the union had violated the Court's order because it sought arbitration of the issue.

No pleading or other document was filed setting forth the employer's position or its contentions, but the court nevertheless scheduled a contempt hearing a few days

9. During the period of ten months from the time of the first dispute on April 26, 1965 to the time of the last-mentioned dispute, the employers had set back the longshoremen seventy-one times and paid only the one-hour guarantee, instead of the four-hour guarantee claimed by the longshoremen (No. 78; R. 31). This became a constant source of discontent among the longshoremen and undoubtedly was the cause of growing unrest.

10. No. 78; R. 70-71, 80, 82-83, 87-88, 91-92, 94-95, 104-106, 109-110, 111, 127-131, 134-136, 139-142, 144-147; Ex. R-1 (R. 39-41), Ex. R-2 (R. 151-152).

later, on March 1, 1966. At the outset of this hearing, the union moved that the employers be required to file a pleading setting forth the facts and circumstances and manner in which the union was supposed to have violated the court's order, so that the union could file an answer and prepare its defense (No. 78; R. 15-16).¹¹ The court summarily denied this motion (No. 78; R. 17). The union then moved for a dismissal on the ground that the entire proceeding was in violation of Section 4 of the Norris-LaGuardia Act and of this Court's decision in the *Sinclair* case; but the District Judge promptly denied this motion also, and directed the parties to proceed with the testimony (No. 78; R. 15). The union then filed a written application for a jury trial under the Act of 1948, but Judge Body summarily denied this motion also (No. 78; R. 13, 15). At the conclusion of the testimony, the District Judge rendered an oral decision from the bench holding the union *and its officers and members* (although neither the officers nor members were made parties at any time to the action) guilty of contempt, on the ground that the union was responsible for the "mass action" of its members, and fined the union \$100,000.00 per day, making it retroactive to 2:00 p.m. that day and for the succeeding days of the "wildcat" work stoppage (No. 78; R. 150-51).

11. In addition to the other defenses heretofore outlined the union also could have alleged in an answer (if appropriate pleadings had been filed with an opportunity to answer by the union and crystallize the issues) the further defense that the employers had failed to set back the men at 7:30 a.m.; as required by 10(6) of the very clause on which the employers relied. The District Judge, however, rejected all arguments that each dispute must be individually handled and ignored this argument also (No. 78; R. 18).

ARGUMENT.

I. The Court Below Was Deprived of Jurisdiction to Entertain the Complaint by Section 4 of the Norris-LaGuardia Act Because It Sought to Restrain a Work Stoppage Arising Out of a Labor Dispute, and the Complaint Should, Therefore, Have Been Summarily Dismissed.

This Court settled beyond all doubt that a federal court is without jurisdiction to issue an order which would have the effect of enjoining a work stoppage or "any one of the kinds of conduct which the specific prohibitions of the Norris-LaGuardia Act withdrew from the injunctive powers of United States courts", in *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195, 8 L. Ed. 2d 440, 82 S. Ct. 1328. The Court below, however, attempts to avoid this conclusion by holding that the order of the District Judge "simply calls upon the defendant for specific performance of the arbitration award", that it was "not an injunction", and that it could not "be reasonably construed as a restraining order". The naked, indisputable fact is that the District Judge held the union in contempt because certain of the members engaged in a work stoppage which he construed to be in violation of his order.¹²

The question here presented is whether the law will look to substance and effect to determine the nature of a

12. The Court of Appeals, in the course of the oral argument, was itself unclear regarding the meaning of Judge Body's order "enforcing the arbitrator's award" and indicated that the order standing by itself could not necessarily be construed to enjoin a work stoppage. There was then pending in the Court of Appeals another appeal from Judge Body's subsequent order holding the union in contempt, which had not been consolidated with the earlier appeal because of respondent's objection. In view of the court's uncertainty at the argument, petitioner moved to consolidate the two appeals, but respondent objected, and the Court of Appeals denied the motion. Said contempt proceeding is the subject of No. 78, this Term.

judicial act or will be blinded by its wrappings. There is no doubt from the facts leading up to the order and from the manner in which it was enforced by contempt and fine, that it was requested, litigated and issued specifically to *enjoin a work stoppage*. The intent and policy of the Norris-LaGuardia Act may not be defeated by calling a labor injunction by another name.

In *Sinclair*, a complaint was filed by the company under Section 301 of the National Labor Relations Act (29 U. S. C. A. 185(a)), based on a contract which provided for compulsory arbitration of all disputes and which also prohibited slowdowns, strikes or any form of work stoppages. *Sinclair* alleged that the union had engaged in a series of strikes and work stoppages, in violation of the no-strike clause and, therefore, sought an order enjoining the union's conduct.

The union successfully moved to dismiss the action under Section 4 of the Norris-LaGuardia Act, and the Court of Appeals sustained that dismissal. This Court affirmed, in a comprehensive opinion which answers all of the issues raised by the opinion of the Court below.

A key point in the case was the provision in the agreement requiring compulsory arbitration, and it was most strongly contended that Section 4 of the Norris-LaGuardia Act must be deemed inapplicable to prevent enforcement of the arbitration process which was alleged to be "a kingpin of federal labor policy", citing *United Steelworkers of America v. American Mfg. Co.*, 363 U. S. 565, 4 L. Ed. 2d 1403; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 4 L. Ed. 2d 1409; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U. S. 593, 4 L. Ed. 2d 1424. To that argument, this Court responded:

"To the extent that those cases relied upon the proposition that the arbitration process is 'a kingpin of federal labor policy,' we think that proposition was founded not upon the policy predilections of this Court

but upon what Congress said and did when it enacted § 301. Certainly we cannot accept any suggestion which would undermine those cases by implying that the Court went beyond its proper power and itself 'forged . . . a kingpin of federal labor policy' inconsistent with that section and its purpose. Consequently, we do not see how cases implementing the purpose of § 301 can be said to have freed this Court from its duty to give effect to the plainly expressed congressional purpose with regard to the continued application of the anti-injunction provisions of the Norris-LaGuardia Act. The argument to the contrary seems to rest upon the notion that injunctions against peaceful strikes are necessary to make the arbitration process effective. But whatever might be said about the merits of this argument, Congress has itself rejected it. In doing so, it set the limit to which it was willing to go in permitting courts to effectuate the congressional policy favoring arbitration and it is not this Court's business to review the wisdom of that decision." (U. S. at 213, L. Ed. at 452)

Notwithstanding the foregoing holding of this Court, the Court below draws the same conclusion from the *Steelworkers* trilogy which this Court specifically rejected in unequivocal terms. The Court below also extracts a brief excerpt from this Court's decision in *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 1 L. Ed. 2d 972, which it erroneously construes in favor of the enforcement of arbitration agreements without being bound by the Norris-LaGuardia Act. In this respect, also, the Court below completely ignores the full discussion of this Court in the *Sinclair* case regarding the *Lincoln Mills* decision. Involved in the *Lincoln Mills* case was the question whether the parties could be compelled to *submit* a dispute to arbitration. The language of this Court is so clearly and decisively contrary to the conclusion drawn by the Court below that it would appear that the latter failed to care-

fully examine the *Sinclair* decision. Said this Court in *Sinclair*, in discussing the *Lincoln Mills* case:

“There the Court held merely that it did not violate the anti-injunction provisions of the Norris-LaGuardia Act to compel the parties to a collective bargaining agreement to arbitration where the agreement itself required arbitration of the dispute. In upholding the jurisdiction of the federal courts to issue such an order against a challenge based upon the Norris-LaGuardia Act, the Court pointed out that the equitable relief granted in that case—a mandatory injunction to carry out an agreement to arbitrate—did not enjoin any one of the kinds of conduct which the specific prohibitions of the Norris-LaGuardia Act withdrew from the injunctive powers of United States courts. An injunction against work stoppages, peaceful picketing or the nonfraudulent encouraging of those activities would, however, prohibit the precise kinds of conduct which subsections (a), (e) and (i) of § 4 of the Norris-LaGuardia Act unequivocally say cannot be prohibited.” (U. S. at 212, L. Ed. at 451)

The Court below held the Norris-LaGuardia Act inapplicable because, it said, the District Court’s order involved the equitable remedy of specific performance. The foregoing excerpt takes the ground from under the lower court’s holding that the order for specific performance was not an injunction or a restraining order. In the above quotation this Court points out that an equitable order for specific performance is a “mandatory injunction”.

Perhaps the most serious error committed by the Court below in its analysis of the *Sinclair* decision is the excerpt taken from that opinion (R. 121-122) which holds that an employer may obtain an order compelling a union to *submit* to arbitration and, from this, the Court below argues that the employer may *enforce an arbitration award*, even though such an order imposes a restraint on strikes or other protected activities. Unfortunately, the Court of Appeals stopped the quote in the middle of the paragraph. Had it

examined the remainder of the paragraph, it would have found that this Court's holding was exactly to the contrary, as follows:

"At the most, what is involved is the question of whether the employer is to be allowed to enjoy the benefits of an injunction along with the right which Congress gave him in § 301 to sue for breach of a collective agreement. And as we have already pointed out, Congress was not willing to insure that enjoyment to an employer at the cost of putting the federal courts back into the business of enjoining strikes and other related peaceful union activities." (U. S. at 214, L. Ed. at 452)

It is crystal clear that the Court below failed to correctly read and incorrectly interpreted this Court's decision in *Sinclair*.

The identical issue was presented to the District Court for the Southern District of New York in *Marine Transport Lines, Inc. v. Curran*, 55 L. C. 11748. There the shipping company obtained an arbitration award and sought judicial enforcement. The shipping company there made all the arguments presented here and, in addition, cited the lower court's decision in the instant case. The New York court declined to follow the decision of the Court of Appeals below and held, on the contrary:

"The court is being asked to enjoin a work stoppage. This is the reality of the situation, whatever may be the form of the proceeding. To the extent that *Philadelphia Marine Trade Assn. v. International Longshoremen's Ass'n* [54 LC para. 11,393] 365 F. 2d 295 (3rd Cir. 1966), cert. granted, 35 U. S. L. Week 3277 (1967), is to the contrary, I decline to follow that decision.

* * *

"In *Sinclair* the employer sought to enjoin a work stoppage before the arbitration took place in order to

make the arbitration effective. Here the employer seeks to enjoin a work stoppage after the arbitration has taken place and after the arbitrator has directed that the work stoppage cease. In my opinion, there is no significant difference between the two situations, as far as the power of this court is concerned. It inevitably follows from *Sinclair* that this court lacks jurisdiction to grant the relief requested here. *Gulf & South American S. S. Co. v. National Maritime Union, supra.*" (55 L. C. para. 1178-1179)

Precisely the same point came before the Court of Appeals for the Fifth Circuit in *Gulf & South American S. S. Co. v. National Maritime Union of America*, 360 F. 2d 63 (1966). Chief Judge Christenberry dismissed the complaint on the authority of this Court's decision in *Sinclair*. In affirming, the Court of Appeals for the Fifth Circuit stated:

"The District Court dismissed the complaint on the ground that it was without jurisdiction to grant the injunctive relief sought in view of § 4 of the Norris-LaGuardia Act, 29 U. S. C. A. § 104. The court rejected the contention of the employer that § 301 of the Taft-Hartley Act, 29 U. S. C. A. § 185, was a *pro tanto* repealer of § 4 of the Norris-LaGuardia Act, and that the court thus had jurisdiction.

"The court relied on *Sinclair Refining Co. v. Atkinson*, 1962, 370 U. S. 195, 82 S. Ct. 1328, 8 L. Ed. 2d 440 as authority for this holding. That decision of the Supreme Court is direct authority on the question and is controlling. There the employer sought the injunction directly while here the injunction is sought under the guise of enforcing the award of an arbitrator but this is a distinction without a difference under the facts of this case, and any other result would be exalting form over substance." (360 F. 2d at 64-65)

The decision of the Court below is clear error. The district court had no jurisdiction to entertain the complaint because of the nature of the relief sought. There was no refusal on the part of the union to submit to arbitration. On the contrary, the union was not only willing but anxious to submit each of the disputes to arbitration, as was required under the agreement. It was the employer who refused to submit the subsequent disputes to arbitration and schemed, instead, to extend the decision in the first dispute to all subsequent disputes. This proceeding was designed not only to frustrate the arbitrations sought by the union, but also to enjoin all work stoppages which might arise out of those disputes. Under this Court's decision in *Sinclair* this may not be done, and upon this ground alone the decision of the Court below should be reversed and the complaint dismissed.

II. The Complaint Should Have Been Dismissed for Mootness.

When the complaint was filed in this case, it was based on an alleged work stoppage on July 29, 1965. When the matter was brought to the attention of the district judge, the longshoremen had already returned to work and the matter was clearly moot.

The district judge recognized and conceded that this action was moot because the men had gone back to work, and there was nothing further to be done (R. 61). Indeed, it was specifically because the case was moot, said Judge Body, that he did not read the decision of this Court in *Sinclair v. Atkinson*, 370 U. S. 195, 8 L. Ed. 2d 440 (R. 82). Yet, he refused to dismiss the suit. This was a further excess of jurisdiction.

In *Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Wisconsin Employment Relations Board*, 340 U. S. 416, 95 L. Ed. 389 (1951), this Court vacated an award of an arbitrator settling a labor dispute, holding that since the case had become moot (be-

cause the immediate dispute had been settled), there was no subject matter upon which the judgment of the court could operate, so that the judgment below was vacated. The Board argued that Wisconsin courts (where the case originated) have a practice of deciding questions of importance even though the case has become moot, and urged the Supreme Court to follow this practice. Mr. Chief Justice Vinson said: "But whatever the practice in Wisconsin courts, 'A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. *United States v. Alaska Steamship Company*, 253 U. S. 113.

The District Judge, notwithstanding these decisions, improperly "retained jurisdiction" so that "if anything arises", he would "handle it at that time". He was clearly in error in refusing to dismiss for mootness.

III. The Refusal of the District Court to Clarify or Explain the Nature of the Conduct Covered by Its Mandatory Order and to Give Reasons for Its Issuance and Make Findings of Fact and Conclusions of Law Is Most Prejudicial and in Flagrant Violation of F. R. C. P. 52(a) and 65(d).

Rule 52(a) applies to all actions tried without a jury, including equitable actions for specific performance. The basic requirements of that Rule are:

"In all actions tried upon the facts without a jury or with an advisory jury the court shall find the facts

13. Indeed, the same practice has been established by the Supreme Court when a controversy becomes moot even during the appellate stage of litigation, whereupon all prior orders should be vacated and the cause remanded with instructions to dismiss. *Brotherhood of Railroad Trainmen v. Chicago & I. M. R. Co.*, 375 U. S. 18, 11 L. Ed. 2d 39 (1963); *Todd v. Joint Apprenticeship Committee*, 332 F. 2d 243 (1964).

2
specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58."

Where an injunction or restraining order is involved, Rule 65(d) provides even more stringent requirements to insure complete clarity and the basis for such orders. Rule 65(d) states:

"Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; . . ."

The order of the District Judge merely provided "the arbitrator's award . . . be specifically enforced by defendant, International Longshoremen's Association, Local 1291, and the said defendant is hereby ordered to comply with and to abide by the said award."

The District Judge failed and refused to make findings of fact and separate conclusions of law as required by Rule 52, and he further specifically refused to state first whether the order was, in fact, an injunction or some form of restraining order, and even more particularly, he refused to state further whether the order enjoined a strike or a work stoppage or arbitration, or in any way to indicate the act or acts sought to be restrained, as Rule 65(d) specifically requires. Nor did the court give any reasons whatever for the issuance of the order, as required by Rule 65(d).

The arbitrator's award merely interpreted Section 10(6) of the agreement and denied the union's claim for a four-hour guarantee. Did "enforcement" of his award mean that the union was restrained from striking, from taking all other disputes to arbitration again, from picket-

ing, or from engaging in any of the other activities protected by the Labor Act? Rules 52(a) and 65(d) were specially designed to cope with this type of situation. Those Rules unequivocally require the court to make its position crystal clear so that there can be no doubt in the minds of the parties as to what act or acts are restrained or in any way affected. The Trial Judge below dangled the ax over the head of the defendant and required the defendant to speculate on what the court had in mind. The fact that the District Judge intended the order to restrain a work stoppage did not become apparent until after he entered an order of contempt in the later proceeding against not only the union but its officers and members because of the "mass action" of the members in causing a work stoppage.

The Court of Appeals below would excuse the action of the District Judge on the ground first that the order was not an injunction, but was one of "specific performance of an arbitration award".¹⁴

The Court below also sought to excuse the failure of the District Judge to comply with the rules on the ground that such failure was "inconsequential" and "minor and in no way decisional". This is an incredible and gravely erroneous conclusion in view of the fact that the alleged violation of the court's order resulted in a catastrophic blow to the defendant local union which, if made effective, puts the union out of business.

It is difficult to imagine anything more "consequential" and "decisional".

In *Hook v. Hook & Ackerman, Inc.*, 213 F. 2d 122, the Court of Appeals below, acting under Rule 52(a), set aside a restraining order because the memorandum opinion of the district court did not clearly state the ground upon

14. This Court stated in *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195, 8 L. Ed. 2d 440 that equitable relief such as an order for specific performance constitutes a "mandatory injunction".

which the injunction had been issued.¹⁵ Rule 65(d) requires that *every* injunction or restraining order set forth the reasons for its issuance and state specifically the act or acts sought to be restrained. Significantly, the Court below, in the case of *Mayflower Industries v. Thor Corporation*, 182 F. 2d 800, 801, held that this requirement is mandatory and that when the rulemakers used the word "every", they did not mean "anything less than what they said".

The Courts below committed the most serious and most prejudicial error in ignoring and flouting the requirements of Rules 52(a) and 65(d).

CONCLUSION.

The District Court took and "retained" jurisdiction of this case without examining the Norris-LaGuardia Act and this Court's decision in the *Sinclair* case, which clearly showed that the court was lacking in jurisdiction. He thereafter proceeded to make his own rules of procedure and completely ignored and violated the key rules of Federal Procedure relating to the filing of a complaint and the entry of orders and decrees and findings and conclusions. It is imperative that this Court strike down the lower court's excursion into anarchy.

The decision of the Court below should be reversed and the complaint dismissed.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
MARTIN J. VIGDERMAN,
FREEDMAN, BOROWSKY AND LORRY,
Counsel for Petitioner.

¹⁵ The Court of Appeals below states that the District Judge could not file findings and conclusions because petitioner immediately appealed the order. The Court overlooks the fact that these findings are required to be filed *with* the order and may even be filed after the appeal. *Gibbs v. Buck*, 307 U. S. 66, 83 L. Ed. 1111.

APPENDIX A.

Norris-LaGuardia Act, 29 USCA.

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions.

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the facts heretofore specified;

(h) Agreeing with other persons to do or not to do any to do any of the acts heretofore specified;

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70 (Norris-LaGuardia Act).

Federal Rules of Civil Procedure.

RULE 52.

FINDINGS BY THE COURT.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended December 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

RULE 65.

INJUNCTIONS.

* * *

(d) **Form and Scope of Injunction or Restraining Order.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.